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SUPREME COURT, U.S.

No. 98-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHAUNCEY JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Virginia

PETITIONER'S REPLY MEMORANDUM

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I. APPELLATE REVIEW OF PASSION AND PREJUDICE CANNOT BE WAIVED

On the ground that no race-based objection was made at trial by Petitioner, the Commonwealth contends that the Petitioner's entitlement to a racially blind trial was "not preserved." For the first time in this case, the Commonwealth is arguing that the requirement of Virginia Supreme Court review of the death sentence has been waived because Petitioner did not affirmatively claim to have been condemned as a result of racial prejudice and passion. The Commonwealth's argument overlooks that the appellate review is unconditionally mandatory. The Virginia Supreme Court reviews the death sentence for passion, prejudice and proportionality under *Va. Code Ann.* § 17-110.1(c)(2) even in the absence of an appeal. *See, e.g., Chabrol v. Commonwealth*, 245 Va. 327, 427 S.E.2d 374 (1993); *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992).

The Commonwealth next asserts that Petitioner waived his right to a proportionality and prejudice review by the appellate court because he failed to raise the subject in a request for reconsideration by that court after it issued its opinion. Petitioner did file a motion for reconsideration by the Virginia Supreme Court, three pages of which were devoted to claims of the court's error on the very subject of prejudice and proportionality.[1]

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[1]At one point, the motion said "...individualized determinations as to the appropriateness of the death penalty as to each defendant is 'crucial' under any death sentencing scheme to ensure that the death penalty is not imposed arbitrarily or irrationally.'" *Citing Parker v. Dugger*, 498 U.S. 308, 321 (1991).

(footnote continued to next page)

Finally, the Commonwealth labels as an "overblown assertion" Petitioner's objection to the use of his race as an indicator of his future dangerousness. (Opposition at 5). Yet, in its brief, the Commonwealth specifically acknowledges the role of race in Petitioner's death sentence:

> During the course of this voir dire, Dr. Nelson [the prosecution psychologist] first told the court and counsel that he could not deliver a definitive opinion on whether Jackson was "future dangerous."

(Opposition at 3).

> Nelson then acknowledged that he could base his testimony on matters other than Jackson's statements [during a pretrial interview].

Also, the Commonwealth accuses Petitioner of a "categorically false" representation in saying that the trial court restricted the Commonwealth's psychologist to testifying once and that his testimony would occur after the defense rested in the sentencing phase. Thus, he would have been among the last witnesses and permitted then, for the first time, to offer testimony on future dangerousness. In approximately sixty pages of transcript on this subject, the trial judge said:

> ...it would be within the Court's discretion to keep him (Dr. Nelson) from testifying twice...and at the defendant's option, his expert testimony if it is to be offered in the rebuttal as to mitigation.
>
> To be offered as well on future dangerousness *at the same time* so that the jury does not hear twice all of his credentials....
>
> (Emphasis added).

(*Id*).

> Finally, Nelson also testified that historically there are several factors pertinent to an assessment of a person's propensity for future violent conduct, including "a defendant's race.'

(*Id*).

Therefore, the Commonwealth recognizes that the psychologist testified he could not opine on future dangerousness, would not rely upon Petitioner's interview statements to him and would instead rely upon the defendant's race as a basis for his testimony.

Given that the Virginia Supreme Court has found that passion and prejudice were absent from the process of sentencing Petitioner to death, the unanswered question posed to this Court remains whether the psychologist's reliance on race as one basis for determining Petitioner's risk of future violent acts can be said not to have so systemically infected the sentencing proceedings and its participants as not to violate Petitioner's due process, equal protection and Eighth Amendment rights.

II. THE RIGHT TO ARGUE PROPORTIONALITY REQUIRES AN ESTABLISHED BENCHMARK

Petitioner's claim, important and unopposed, is that, while he was permitted by the Virginia death penalty statute to brief and argue prejudice, passion and proportionality to the Supreme Court of Virginia, he was uninformed of what the standard is for measuring proportionality. Petitioner's challenge is directed to the application of the statute in this case, an error which "could not have been raised on direct

appeal because appellate review had yet to take place." *Turner v. Williams*, 35 F.3d 872, 891, n.8 (4th Cir. 1994), *cert. denied sub nom, Turner v. Jabe*, 514 U.S. 1016 (1995), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 214 (4th Cir. 1996). The challenge is not directed to the facial constitutionality of the Virginia death penalty review statute. The Commonwealth's opposition to the Petition, directed to such a non-existent claim, merely introduces a distraction.

Petitioner claims that he was denied due process as a result of the application of the Virginia death penalty review statute. The only basis for proportionality comparison announced by the Virginia Supreme Court is that the death penalty will be upheld if it is imposed in a case in which "juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant." *Stamper v. Commonwealth*, 220 Va. 260, 283-284, 257 S.E.2d 808, 824 (1979). That "standard" is so vague that it is meaningless. As a consequence, Petitioner was denied the process which he was due in order to brief and argue meaningfully the issues to be considered by the court.

III. A JUROR'S INABILITY TO READ THE EVIDENCE IS CONSTITIONALLY DISQUALIFYING

The Commonwealth contends that the Petitioner seeks to have this Court bar illiterate jurors from jury service. (Opposition at 9). That incorrect assertion obscures the important question presented. The question is whether seating a juror who cannot read the English language deprives a capital defendant, in a case with material documentary evidence, of the Constitutional right to an impartial—meaning, in part, an independent—jury in derogation of the Sixth and Fourteenth Amendments.

CONCLUSION

It is prayed that the Petition for Certiorari be granted.

Respectfully submitted,

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